

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-7557

Docket No. 76-7557
76-7572
76-7589

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTHONY PEREZ, JR.,

Plaintiff-Appellant-Appellee,

-against-

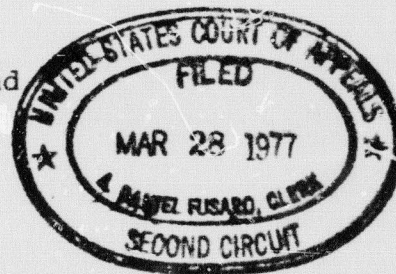
MUHAMMAD ALI a/k/a Cassius Clay,

Defendant and Third Party
Plaintiff-Appellee-Appellant,

-against-

AMERICAN BROADCASTING COMPANIES, INC. and
ABC SPORTS, INC.,

Third Party Defendants-
Appellees-Appellants.



REPLY BRIEF OF DEFENDANT AND THIRD-PARTY
PLAINTIFF APPELLEE-APPELLANT MUHAMMAD ALI
TO THE BRIEF OF AMERICAN BROADCASTING COM-
PANIES, INC. AND ABC SPORTS, INC.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ANTHONY PEREZ, JR., :
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 Plaintiff-Appellant- :
 Appellee, :
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 -against- : Docket Nos. 76-7557
 : 76-7572
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 MUHAMMAD ALI a/k/a Cassius Clay, :
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 Defendant and Third- :
 Party Plaintiff-Appellee- :
 Appellant, :
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 -against- :
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 AMERICAN BROADCASTING COMPANIES, INC. :
 and ABC SPORTS, INC., :
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 Third-Party Defendants- :
 Appellees-Appellants. :
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REPLY BRIEF OF DEFENDANT AND THIRD-PARTY
PLAINTIFF APPELLEE-APPELLANT MUHAMMAD ALI
TO THE BRIEF OF AMERICAN BROADCASTING COM-
PANIES, INC. AND ABC SPORTS, INC.

Preliminary Statement

This brief is submitted by defendant and third-party plaintiff-appellee-appellant Muhammad Ali ("Ali") in reply to the brief of third-party defendants, appellees-appellants, American Broadcasting Companies, Inc. and ABC Sports, Inc. (hereinafter "ABC").

By notice of appeal dated November 15, 1976, Ali appealed, among other things, from "that portion of said judgment which

dismissed Ali's third-party claims" against ABC. Ali had claimed that if Ali were liable in the main action to Anthony Perez, Jr. ("Perez") for the remarks broadcast by ABC on March 29, 1975, then ABC would be liable in indemnity or contribution to Ali. The Court did not submit the indemnity claim to the jury, but did submit the contribution claim. The jury found against Perez and consequently never reached the contribution claim, and the Court, therefore, dismissed that claim as moot. It is the position of Ali on this appeal that, in the event that the jury verdict against Perez is reversed, Ali's claims for indemnification and contribution against ABC should be reinstated.

ABC counterclaimed against Ali for indemnity and contribution in the event that Perez were to recover a judgment against ABC in an action brought by Perez against ABC in the Supreme Court of New York, County of New York, Index No. 06463/75. On the first day of trial in this action, counsel for ABC sought to withdraw these counterclaims against Ali. The Court denied the motion. (ABC 13)* After the jury verdict, the Court dismissed ABC's counterclaims against Ali for failure of proof (Tr. 674, 698).

ABC now argues 1) that the Court properly dismissed Ali's third-party claim for indemnity, 2) that the Court properly dismissed Ali's third-party claim for contribution (but that the

*References to "ABC " are to the additional pages of transcript annexed to ABC's brief. References to "Tr. " are to the transcript pages in the Joint Appendix and references to "ABC Br. p." are to ABC's Brief.

claim should never have been submitted to the jury) and 3) that the Court should have permitted ABC to withdraw its counter-claims against Ali and that the Court should not have dismissed them for failure of proof.

ARGUMENT

I

IF A NEW TRIAL IS GRANTED, ALI'S THIRD-PARTY CLAIMS AGAINST ABC SHOULD BE REINSTATED

a) Ali's claim for indemnity

The Court did not submit Ali's indemnity claim to the jury. It gave no reason* (Tr. 564). Ali established at trial that the interview was taped on March 28, 1975, edited by ABC, and then broadcast by ABC the next day, March 29, 1975. The main complaint sought damages only for the broadcast, not for the utterances made in the television studio the day before, during the taping of the show. It was ABC, therefore, which published the alleged defamatory remarks and, as ABC's counsel conceded, the broadcast was an "independent act of ABC" (ABC 11).

Moreover, Ali testified that he relied on ABC and its lawyers to delete any "illegal" remarks Ali may have made (Tr. 308). Despite the fact that Howard Cosell called Ali's remarks "absurd" immediately after they were spoken (Tr. 148), ABC did not delete Ali's remarks and broadcast the interview

*Its refusal to submit this issue is puzzling since it did submit the issue of contribution.

the next day.

Accordingly, on those facts and contrary to ABC's argument (ABC Br. p. 8 et seq.) ABC was the intentional or active tort-feasor and Ali, if anything, the passive tort-feasor. The Perez complaint sought damages only for the "publication" by ABC of Ali's remarks on the March 29, 1975 broadcast. By choosing to publish the remarks, after a one day interval, ABC became the active tort-feasor. Ali, on the other hand, relied on the judgment of ABC as to which portions, if any, of the interview would be published. Accordingly, ABC's entire argument, based on Ali's alleged commission of an intentional tort, is misplaced. In any event, whether Ali was an active or passive tort-feasor was a question of fact which the Court should have submitted to the jury.

b) Ali's claim for contribution

The Court did submit Ali's claim for implied contribution to the jury with an instruction that it need not reach those claims unless it found for Perez against Ali (Tr. 646). Since the jury returned a verdict against Perez, these claims became moot and were dismissed (Tr. 674).

ABC now argues that, if the main action is reversed, Ali's claims for contribution should not be permitted to go to the jury. ABC makes essentially the same argument on this point as it does on the indemnification point, with the addition that ABC contends that despite the ruling of Dole v. Dow Chemical Co.,

30 N.Y. 2d 143 (1972), which expressly provided for contribution among joint tort-feasors, New York would not permit any contribution among intentional joint tort-feasors (ABC Br. p. 14 et seq.). This argument is misplaced both on the facts and the law.

First, ABC assumes that Ali was an intentional tort-feasor. The proof at trial was to the contrary -- it was ABC's independent decision to publish Ali's remarks, and it is that publication of which Perez complained.

Second, ABC intentionally published a statement which its interviewer stated was "absurd". Ali relied on ABC to edit the video-tape and delete any "illegal" remarks. It had previously edited the video-tape (Tr. 308) and it had one full day to review it again. Nevertheless, in disregard of Cosell's remarks, it broadcast Ali's statements.

Finally, ABC cites two lower court New York cases which refuse to apply the New York Court of Appeals rule of Dole v. Dow to intentional tort-feasors -- which Ali was not -- and, indeed, one Southern District case to the contrary (ABC Br. pp. 17-18). In short, there is no persuasive precedent to indicate that the Dole v. Dow rule will not apply, even if Ali were to be found to be an intentional tort-feasor.

The Court was correct to submit this issue to the jury and, if the main claim is remanded, this issue should be remanded as well.

II

DISMISSAL OF ABC'S COUNTERCLAIMS
FOR FAILURE OF PROOF WAS APPROPRIATE

ABC argues (a) that the Court erred in refusing to permit it to withdraw its counterclaims for indemnity against Ali on the first day of trial and, further, (b) that although during the trial ABC submitted no proof whatsoever with respect to those claims, the Court should not have dismissed them.

ABC waited until the day this trial commenced to ask leave of the Court to withdraw its claims against Ali for indemnification should Perez succeed against ABC in the New York State Supreme Court action. ABC knew long before this trial began that the State Court action would follow this one to trial. Ali is not a party to the State Court action. He was not named by Perez or brought in by ABC. Nevertheless, ABC waited until the last possible moment in this action to ask the Court for permission to withdraw its counterclaims. The Court, in its discretion, denied the motion. Under the circumstances, this decision was appropriate and will not be reversed unless a clear showing is made that the Court abused its discretion Paturzo v. Home Life Insurance Co., 503 F.2d 333, 335-6 (4th Cir. 1974); 5 Moore's Federal Practice ¶ 41.05[1]; Wright & Miller, Federal Practice and Procedure: Civil § 2364. ABC, which chose to assert its claims in this action, had a last minute change of heart and cannot now be heard to complain.

Moreover, having been put on notice that its claims against Ali were at issue, ABC completely failed to present any proof. Accordingly, dismissal for "failure of proof" was proper.

Conclusion

For the foregoing reasons if a new trial is granted Ali's third party claims against ABC should be reinstated and the judgment dismissing ABC's counterclaims for failure of proof should be affirmed.

Respectfully submitted,

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